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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1081

THE AMERICAN TOBACCO COMPANY,

Petitioner,

v.

EDGAR RUSSELL, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Petitioner, The American Tobacco Company, a division of American Brands, Inc. (hereinafter referred to as "American"), respectfully prays that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fourth Circuit finally entered on November 4, 1975, which erroneously interpreted Section 703(h) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(h) (1970), in modifying, in relevant part, a decision of the trial court, that where blacks have had equality of opportunity to be hired at either one of two completely separate and distinct plants of American, black employees of one plant could not be affected by discriminatory practices at the other plant and therefore were not entitled to transfer to the other plant or to back pay relief.

Opinions Below

The memorandum opinion of the United States District Court for the Middle District of North Carolina is reported at 374 F. Supp. 286 (A1).* The order of the United States District Court is unreported (A29). The opinion of the Court of Appeals is reported at —— F.2d ——, 10 EPD ¶ 10,412 (A40). The order of the Court of Appeals denying the petition for rehearing and modifying the language of the original opinion is unreported (A54).

Jurisdiction

The opinion of the Court of Appeals was first entered on September 24, 1975. A timely petition for rehearing and suggesting rehearing in banc was denied by order entered November 4, 1975. This petition for certiorari was filed within 90 days of the entry of that order. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Question Presented

Whether the Court of Appeals' construction of Section 703(h) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(h) (1970), which section permits, as a lawful employment practice, different rates of pay and terms and conditions of employment for "employees who work in different locations," was erroneous (i) in holding, as a rule of law, that employees of different plants who were hired from the same general labor market do not fall into the

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* All relevant opinions and orders of the District Court and Court of Appeals are reprinted in the Appendix to this petition.

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category of "employees who work in different locations" and (ii) in ordering that black employees, both regular and seasonal, at one plant be permitted to transfer into regular jobs at another plant, when such black employees were never affected by the discriminatory practices at that other plant.

Statutory Provision Involved

Section 703(h) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(h):

> "*Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment* pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or *to employees who work in different locations,* provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29." [Emphasis added.]

Statement of the Case

(a) Factual Background

This action was commenced in January 1968 as a class action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* ("Title VII") against American and Local 192, Tobacco Workers' International Union. Some of the named plaintiffs are employees of American's cigarette factory which is located within the corporate limits of the City of Reidsville, North Carolina, and manufactures cigarettes ("Branch") and others are employees of American's tobacco leaf handling facility which is located some two miles away from Branch in rural Rockingham County, North Carolina, and stems, stores and handles raw leaf tobacco ("Leaf") (A2).

Branch is a highly automated cigarette manufacturing plant, consisting of two departments: prefabrication and fabrication. Prefabrication blends, cuts, dries, flavors and generally assures the condition of the tobacco for manufacture into cigarettes (A3). Fabrication manufactures, packages, cartons, cases and ships the finished product (A3). Operations at Branch are conducted on a year-round basis with full-time regular employees. Wages are based on job classifications, according to skills and the nature of the equipment which is operated.

In contrast, Leaf deals with raw leaf tobacco and is largely a manual and seasonal operation. The Leaf operation is primarily geared to the period from July to January during which American purchases and receives delivery of raw leaf tobacco on the tobacco auction markets. Employment requirements at Leaf peak during the auction season and necessitate the hiring of a large number of seasonal part-time employees. Seasonal employees outnumber regular employees during that seven month period of the year (A22 and A43). The seasonal workers stem the raw

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leaf tobacco and pack it into hogsheads for storage. When that task is completed seasonal employees are terminated.

Full-time Leaf employees are responsible for warehousing the stemmed and packed tobacco and for preparing it for sale and delivery to Branch, as needed. Tobacco may age at Leaf warehouses for months or for years, depending on the manufacturing requirements of Branch.

Branch and Leaf are under separate management (A43) with their own plant managers in charge of day-to-day operations. Each is within a different division of American, Branch being in the manufacturing division and Leaf being in the leaf division.* For many years, Branch and Leaf were within separate corporate entities. Both are fiscally independent of each other.

Because of the distinct nature of their operations and their own individual manpower needs, Branch and Leaf have always been responsible for and conducted their own hiring at their own locations. No central hiring office has ever existed and Branch and Leaf have never shared an employee labor pool. There is no interchange of employees between the two facilities; an employee hired at one facility is not assigned to the other.

The manpower needs of the two facilities differ significantly. Leaf requires a large force of seasonal workers (A22 and A43); Branch requires none. For a ten year period (1955-1965) there were no new hires at all at Branch (A9) because of improved and more efficient manufacturing processes and machinery. Leaf, however, continued to hire both regular and seasonal employees during the same period.

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* A general accounting office is located in Reidsville which is under separate management and is accountable directly to the accounting management in New York. While this office performs certain accounting functions for both Branch and Leaf, it has nothing to do with the operation of Branch or Leaf or with their personnel policies, hiring or promotion.

The bargaining agent for hourly-rated employees of both facilities is a local of the Tobacco Workers' International Union (A2). A master collective bargaining agreement, negotiated with joint union committees from different locals, covers the regular employees of seven separate facilities of American located in two states, four of which are manufacturing plants, including Branch at Reidsville, and three of which are leaf operations, including Leaf in Rockingham County. A different master contract covers the seasonal workers at Leaf (A10 and A55), as well as seasonal employees at two other leaf handling facilities in North Carolina and Virginia.

Under the agreements Branch and Leaf have completely separate and distinct lines of seniority (A8). In addition, the agreement covering regular employees provides for loss of seniority if the employee, *inter alia*, transfers between plants, subject to an exception in the case of a transfer made at the request of management of the manufacturing division or the leaf division. During the twenty or so year history of operations in evidence before the District Court there was only one instance of such a transfer. On that extraordinary occasion, in 1963, four boiler operators and two mechanics were transferred from Branch to Leaf because there were no qualified employees for the operation of a new Leaf facility power plant. There have been no transfers of hourly-rated employees from Leaf to Branch.

Branch has always hired both blacks and whites. Prior to October 1963 a departmental seniority system existed at Branch, with separate lines of seniority in the fabrication and prefabrication departments (A10-A11). Those departmental seniority lines were abolished and replaced by a plant-wide seniority system at that time (A11). Until 1968 an agreement between the company and the union provided that certain jobs at Branch carried a special "seniority and qualifications" requirement, which was designed to permit some employees who were demoted due

to modernization to return to their old jobs as openings occurred (A12). In 1968, that practice was eliminated (A11).

Leaf, which has also hired both blacks and whites, never maintained a departmental seniority system, nor did it ever establish the special "seniority and qualifications" job requirement utilized by Branch.

(b) Proceedings Below

The District Court concluded that certain employment practices at Branch discriminated against some black Branch employees. The use of the special "seniority and qualifications" criteria which permitted whites with less seniority than more senior blacks to return to higher paying jobs in the fabrication department was found to constitute unlawful discrimination (A12-A14). So too was the practice of requiring what the Court deemed to be an excessive amount of time on a given job before receiving the prevailing rate (A15). American did not appeal from these conclusions. The District Court also concluded, however, that none of the offending practices at Branch had any effect on black employees at Leaf,* since it found that Branch and Leaf were "completely separate and distinct operations," (A8) and that there was "equality of opportunity to be hired at either Branch or Leaf" (A9).

On all the facts before it, the District Court expressly stated "any contention that Branch and Leaf are nothing more than two departments in the American Tobacco Company is specifically rejected" (A9). It found "that the two lines of seniority should not be merged and that there is no justification in law or in fact for merging the two lines of seniority" (A9). Accordingly, it did not grant the

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* The only discriminatory practice found by the District Court involving Leaf was in the selection of supervisory personnel (A23). The District Court did not find that the selection of supervisory personnel at Branch was discriminatory (A24).

requested relief that the seniority lines be merged and that black employees at Leaf be allowed to transfer into jobs at Branch.

In reversing the District Court's finding that the operations at Branch and Leaf were completely separate and distinct, the Court of Appeals first held that the two separate plants were not "different locations" under Section 703(h) of Title VII because each plant hired employees from the general pool of unskilled labor in the labor market for that geographic area (A46).* Given this conclusion, it assumed that "an applicant for a job *can be* assigned to an entry level position in either plant" (A46). [Emphasis added.] Having reversed the District Court's clear finding of fact that Branch and Leaf were separate, the Court of Appeals then found that "[t]he evidence discloses that for a number of years the company overtly assigned white workers to the fabrication department [at Branch] and black workers to lower paying jobs in prefabrication [at Branch] and Leaf" (A47).

The Court of Appeals did not state what "evidence" there was of "overt assignment" between Branch and Leaf. It did not find any of the District Court's findings of fact to be clearly erroneous. It did not and could not cite any instance of "overt assignment" of whites to one plant and blacks to the other plant, nor did it explain how there could have been "overt assignment" where Branch and Leaf maintain totally separate hiring offices, where each has always hired both blacks and whites and where their respective hiring needs have not been contemporaneous. Nevertheless, it ordered that black employees at Leaf who were hired before the elimination of discriminatory practices at Branch should be permitted to transfer to Branch (A48). Transfer rights to regular employment at Branch were not

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* While the Court of Appeals cited several factors as having a bearing on its determination of the "different locations" question, it is clear that its decision was based on its "labor market" test.

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only granted to black regular employees at Leaf but also were granted to the part-time black seasonal employees at Leaf (A48).

Reasons For Granting The Writ

This case presents a novel and important question of federal law under Title VII of the Civil Rights Act of 1964 which should now be settled by this Court. The decision below represents the first judicial interpretation of what constitutes "different locations" under Section 703(h) of Title VII. The Equal Employment Opportunity Commission, as amicus curiae, acknowledged in oral argument before the Court of Appeals that the interpretation of "different locations" is of importance to it. All parties to this action have recognized that this is a question of first impression.

Section 703(h) of Title VII provides, in relevant part, as follows:

> "Notwithstanding any other provision of this subchapter, *it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment . . . to employees who work in different locations,* provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin. . . ." [Emphasis added.]

While the legislative history of Section 703(h) is neither voluminous nor highly instructive, it is clear that Congress did not intend to destroy the right of a company to operate separate business facilities at different locations, and that it took pains to emphasize its intent by expressly excluding such operation from the reach of the statute, recognizing only that employers could not abuse the broader purpose of Title VII by conducting discriminatory practices under the guise of operating separate facilities.

That such was the intent of Congress is clear from the various comments by members of Congress on Section 703 (h). Thus Senator Humphrey aptly describes the very situation presented by this case:

> "For example, if an employer has two plants in different locations, and one of the plants employs substantially more Negroes than the other, it is not unlawful discrimination if the pay, conditions, or facilities are better at one plant than at the other unless it is shown that the employer was intending to discriminate for or against one of the racial groups." 110 Cong. Rec. 12723 (1964).

And Senator Williams noted that Section 703(h) would "permit differences in pay and other terms of employment for employees whose work is in different locations"—a point that "is important to the employer as well as to the employee." 110 Cong. Rec. 14331 (1964).

In short, absent a discriminatory intent, a company may lawfully operate two different plants with different rates of pay, terms and conditions of employment, even though minority employees may be found in greater numbers at the less desirable plant.

The Court of Appeals recognized that if Leaf and Branch were different locations, and absent any intention to discriminate, American's refusal to allow inter-plant transfers would not have violated the Act (A45). However, it then proceeded to establish as its criterion for the determination of "different locations" the "labor market" upon which the plants draw—a test which destroys the very concept of separate and different plants or facilities intended to be protected by Section 703(h). It stated its test as follows:

> "It is readily apparent, however, that the labor market is the most important criterion for determining whether a company's employees work in different loca-

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> tions. If the labor for each plant is recruited from different geographical areas, or if one plant requires labor possessing different skills from the labor employed at another company plant, it is obvious that the company cannot draw from the same labor market to man its plants. Under these circumstances, it generally can be said that the employees work at different locations. In contrast, *if a company can operate two or more of its plants with employees from the same geographical area who are unskilled or possess the same skills, an applicant for a job can be assigned to an entry level position in either plant.* Therefore, these employees, having been hired from the same labor market, would not generally fall within the statutory class of 'employees who work in different locations.'" (A46). [Emphasis added.]

Under the "labor market" test adopted by the Court of Appeals, where an employer operates two separate plants in the same area, although there may be significant differences between the two facilities in the nature of their activities, in their hiring and manpower requirements, in their ability to pay higher or lower wages, in their financial results and objectives and in their relations with their employees, if the plants could have hired entry level employees from the same labor market, then for Title VII purposes the employer must treat the two plants as one, with an obligation to permit inter-plant transfers.

No such far-fetched intent should be ascribed to Congress in its enactment of Title VII. On the contrary, Section 703(h) is an express recognition by Congress that differences in wages and working conditions at different locations are likely to be based on a number of diverse factors and that such differences are not *per se* unlawful employment practices.

The unreasonableness of the "labor market" test is well demonstrated by the facts of this case. Over the years

American's tobacco business has been conducted on the basis of two separate divisions: leaf and manufacture, each consisting of several wide-spread facilities. Leaf's principal concern has been with raw tobacco; it has been responsible for the stemming and re-drying of the raw tobacco leaf and for its storage. Manufacture's primary concern has been with the manufacture of tobacco into cigarettes. As set forth earlier, the leaf and manufacture divisions operate independently of one another; they run their own plants and hire their own personnel. Their plant wage scales differ for the very simple reason that they perform very different kinds of work, the handling of tobacco leaf being largely a seasonal manual operation and the manufacture of cigarettes being full time and highly automated. It is clear that American's dual operations were not established for the purpose of discrimination.

The Court of Appeals disregarded the realities of American's separate operations and artificially treated them as a single operation by establishing a new rule of law, the result of which is to now tell American, and other companies similarly situated, that, after many years of separate operation, they should have hired entry level employees on a company-wide basis and not on a plant-wide basis. According to the Court of Appeals, separate plants of the same company would now be required to hire all employees at a central location or under central control so that "an applicant for a job can be assigned to an entry level position in either plant". Such a result was never contemplated by Title VII and is in direct contravention of Section 703(h).

Once having applied its test and reached the erroneous conclusion that American's two separate plants were one location, the Court of Appeals then treated Leaf as simply being one of three departments, the other two being fabrication and prefabrication at Branch. The Court of Appeals took the District Court's finding that certain em-

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ployment practices at Branch continued the effects of pre-Act discriminatory assignment of blacks to a department within Branch and transmuted that discrimination to black employees at Leaf who, because Leaf and Branch were totally separate, were never subject to the employment practices at Branch. In so doing the Court of Appeals ignored the critical fact and the finding of the District Court that blacks had "equality of opportunity to be hired at either Branch or Leaf".

The Court of Appeals' improper hypostatization of American's two plants as merely being departments of a single location led it into the further error of concluding that the "company overtly assigned . . . black workers to lower paying jobs in prefabrication [at Branch] and Leaf" —a conclusion in direct conflict with the evidence and the findings of the District Court that Branch and Leaf were "completely separate and distinct operations" and that blacks had "equality of opportunity to be hired at either Branch or Leaf".

Blacks were not hired by American through a central hiring system and then "assigned" to either Leaf or Branch. They could have been hired at the employment office of either plant but only on the basis of each plant's individual manpower needs. It is clear that the distinct and different manpower needs of Leaf and Branch do not give American the option to assign employees to one plant or the other; for example, "[t]here was no hiring between 1955 and 1965 at Branch".

In addition, more than fifty percent of the hourly rated employees at Leaf are seasonal workers.* They are hired in anticipation of the tobacco auction season each year in order to handle the current crop of raw leaf tobacco. Ob-

* The seasonal work force is made up largely of floaters, farmers, and persons holding more than one job. In recognition of the nature of seasonal work and the character of the seasonal work force, Leaf management can be much more liberal in terms of work standards and absenteeism than it or Branch management could afford to be with full-time employees.

viously seasonal employees cannot be "assigned to an entry level position in either plant," since Branch neither needs nor employs a seasonal work force. Its labor requirements are much more demanding than those for seasonal employment at Leaf. Yet under the decision of the Court of Appeals seasonal workers will now be entitled to transfer to Branch, despite the fact that because of the operations and requirements at Branch they could not have been assigned or hired there in a seasonal capacity in the first instance. Thus a major vice of the "labor market" test is clearly exposed; it ignores the special hiring requirements and manpower needs that separate and different plants can, and do, actually possess.

Blacks have always had the opportunity to seek employment at either Leaf or Branch. Their choice was in no way restricted by American. However, within Branch, prior to 1963, blacks were assigned by Branch management to the prefabrication department and were unable to transfer into fabrication. It was the perpetuation of this intra-plant discrimination at which the relief granted by the District Court was aimed. No such discrimination was found to exist at Leaf.* Thus, as the District Court correctly found, employees at Leaf could not have been affected by the discrimination at Branch and were properly excluded from any transfer relief. *United States* v. *Chesapeake & Ohio Ry. Co.*, 471 F.2d 582, 593 (4th Cir. 1972), *cert. denied*, 411 U.S. 939 (1973); *United States* v. *Bethlehem Steel Corp.*, 446 F.2d 652, 665 (2d Cir. 1971).

The reliance by the Court of Appeals on cases such as *Robinson* v. *Lorillard Corp.*, 444 F.2d 791 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971), and *Quarles* v. *Philip Morris, Inc.*, 279 F. Supp. 505 (E.D. Va. 1968), is misplaced. Those cases did not address the issue of "different locations" under Section 703(h), but were concerned with departmental seniority systems. In contrast, this case is

* The only discrimination found at Leaf was in selection of supervisors.

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concerned not with departments, but with separate plants, which were not established for discriminatory purposes.

If the erroneous construction of Section 703(h) by the court below remains undisturbed it will predetermine present and potential suits involving the question of "different locations" with far reaching consequences for both management and labor, to say nothing of the effective enforcement and administration of Title VII itself.

Every employer which maintains, directly or through its subsidiaries, more than one plant in any geographic labor market will be subject to lawsuits and potential liability, no matter how different the nature of their operations, their activities and their economic conditions. Individual plant hiring practices, no matter how legitimate and reasonable, will become questionable and may very well have to be supplanted by company-wide hiring practices. Rights of employees, both black and white, based on a legitimate system of plant-wide seniority and secured through no racially invidious employment practices will be subject to disruption.* Plants, long regarded as separate for collective bargaining purposes under the National Labor Relations Act, as well as for the purpose of other federal and state statutes, will be transformed into one location for the purpose of Title VII.

Application of the "labor market" test adopted by the Court of Appeals will cause plants to fluctuate between being "different locations" and the same location, depending on changes in hiring circumstances or changes in the relevant labor market. They will even be "different locations" as to some employees and "one location" as to other employees. For example, if two plants within the same labor market both hire "unskilled" employees during any given period who "can be assigned to an entry level position at either plant" they will not be "different locations." If, on the other hand, one plant is hiring

* In this very case blacks at Branch will find their opportunities for promotion jeopardized as a result of transfers from Leaf.

"skilled" labor and the other "unskilled" during another period, they will be "different locations." The same sort of uncertainties will also arise from changes in the geographic scope of the labor market—changes that are not an uncommon occurrence. *See generally,* Fiss, *A Theory of Fair Employment Laws,* 38 U. Chi. L. Rev. 235, 277 (1971).

The interpretation of the "different locations" provision of Section 703(h) by the Court of Appeals which directly contravenes the language of the statute and frustrates the clear intent of the Congress, would subject employers and employees alike to unwarranted risks and uncertainties. It should not be permitted to stand.

CONCLUSION

For these reasons, a writ of certiorari should be issued to review the opinion and judgment of the Fourth Circuit.

Respectfully submitted,

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Memorandum Opinion, January 18, 1973, U.S.D.C., Middle District North Carolina.

Edgar Russell et al., Plaintiffs,

v.

The American Tobacco Company and Local 192, Tobacco Workers' International Union, an affiliate of AFL-CIO, Defendants.

No. C-2-G-68.

United States District Court,
M. D. North Carolina,
Greensboro Division.
Jan. 18, 1973.

* * * * * *

Memorandum Opinion

GORDON, Chief Judge.

This action was instituted pursuant to the provisions of the Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e et seq. The purpose of the action is to enjoin the defendants from alleged violation of the Act as well as to secure certain affirmative relief for the plaintiffs, and their class, as a result of prior alleged violations of the Act.

Messrs. Edgar Russell, Frederick Broadnax, Alvis Motley, Jr., James R. Vaughn, Lawrence Price, Jr., Glen A. Lee, Haywood Gilliam and James R. Kaylor are Negro citizens of the United States and residents of Reidsville, North Carolina. Messrs. Edgar Russell, Frederick Broadnax, Alvis Motley, Jr., James R. Vaughn, Lawrence Price and Glen A. Lee are employed by the defendant The American Tobacco Company (Company) at its Reidsville Branch in Reidsville, North Carolina. Messrs. Haywood Gilliam and James R. Kaylor are employed by the defendant Company at its Rockingham

County Leaf Operation. All are members in good standing of defendant Local Union 192, Tobacco Workers' International Union, AFL-CIO.

Defendant Company is a corporation organized and existing under the laws of the State of New Jersey. The Company operates facilities for the handling and processing of leaf tobacco and the manufacturing of cigarettes in the City of Reidsville and in Rockingham County, North Carolina. The Company is an employer in an industry affecting commerce within the meaning of Section 701(b) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(b).

The defendant Local 192, Tobacco Workers' International Union, AFL-CIO (Local) is a labor organization representing hourly paid employees of the Company in dealing and negotiating with the Company concerning terms, conditions, and privileges of employment of employees of the Company. The Local is a labor organization within the meaning of Section 701(d) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(d).

The Company operates a plant in Reidsville, North Carolina, and one in Rockingham County, North Carolina, at which plants it conducts two major operations. More particularly, these are:

(a) The Reidsville branch of The American Tobacco Company (Branch) which receives tobacco from the Leaf Department, blends, processes and manufactures it in its filter and non-filter cigarettes for sale to the general public.

(b) The Reidsville Leaf Department of The American Tobacco Company located outside the corporate limits of the City of Reidsville but within Rockingham County (Leaf), which handles green leaf tobacco, such as burley, bright, Maryland, etc., processes and stores it until needed in Branch. Leaf also handles Turkish tobacco.

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Memorandum Opinion, January 18, 1973, U.S.D.C., Middle District North Carolina.

The departments or areas of employment utilized by the Company in its Branch operations are:

(a) *Fabrication:* Where cigarettes are made and packed, filters for cigarettes are made and where cigarettes are stored. The shipping and receiving operations are classified under fabrication; and
(b) *Pre-fabrication:* Where tobacco is received, conditioned, blended, cut and dried until needed in Fabrication.

The departments or areas of employment utilized by the Company in its Leaf operations are:

(a) *Stemming:* Where green leaf tobacco is first received, processed and handled;
(b) *Storage:* Where tobacco is stored until needed;
(c) *Blending:* Where tobacco is initially blended according to the brand of cigarettes to be produced; and
(d) *Turkish:* Which handles its special type of tobacco.

Employees in the Leaf department are classified as either regular employees or seasonal employees. Regular employees are employed on a year round basis. Seasonal employees are employed on a seasonal or temporary basis, usually from July to January of the following year.

Craft jobs such as electrician, machinist, tinsmith, welder, etc., are jobs classified in Fabrication although employees in these categories might perform duties in Fabrication and Pre-fabrication.

JURISDICTION

By order filed January 20, 1971, motions to dismiss filed by the defendants on the ground that the action was not a variance between the allegations contained in the com- timely instituted, as well as upon the ground that there was

plaint and the charges filed by the plaintiffs with the Equal Employment Opportunity Commission (EEOC or Commission), were denied. A complete recapitulation of that order at this point would serve no purpose. However, suffice it to say that although it is important that the parties defendant be named in the charge lodged with the EEOC, Mickel v. S. C. State Employment Service, 377 F.2d 239 (4th Cir. 1967), cert. denied, 389 U.S. 877, 88 S. Ct. 177, 19 L.Ed.2d 166 (1967), and that grievances be set out so that EEOC investigators can ascertain their substance, the specificity associated with legal expertise is unnecessary. When the charge provides a general notice of the situation, a subsequent court action may include those issues which grow out of or are reasonably related to the Commission's investigation. Sciaraffa v. Oxford Paper Co., 310 F.Supp. 891, 898 (D.Me.1970); Younger v. Glamorgan Pipe and Foundry Co., 310 F.Supp. 195 (W.D.Va.1969); Logan v. General Fireproofing Co., 309 F.Supp. 1096 (W.D.N.C.1969).

The gist of plaintiff Russell's letter to the EEOC was that for some time, allegedly, the Company had discriminated by reason of race in the promotion and transfer of black employees, specifically in two departments and that Local 192 had acquiesced in this conduct. This notice is sufficient to encompass the issues raised by the evidence.

In its earlier order, the Court reaffirmed, as it does here, the interpretation of the Civil Rights Act of 1964 which requires that suit be brought within thirty days of receiving the EEOC cause letter. Goodman v. City Products Corp., Ben Franklin Division, 425 F.2d 702 (6th Cir. 1970). As stated in the earlier order, although the others might be precluded from maintaining individual actions by reason of the time limitation, they are included in the class of black employees of the Company, represented by the plaintiffs, James Kaylor, Edgar Russell, and Haywood Gilliam. Russell as an employee of the Branch op-

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eration has standing to represent similarly situated persons, while Kaylor and Gilliam, as employees of the Leaf operation of the Company have standing to represent other persons similarly situated.

Russell's letter of July 26, 1967, to the EEOC specifically charged an acquiescence by Local 192 in the discrimination allegedly committed by the Company. Russell, as a member in good standing of Local 192, has standing in this action to represent the class of all other blacks who are members of Local 192.

Local 192 relies originally on the contention that the charging letter not being under oath by Russell, jurisdiction has never been established for the EEOC to act or for this Court to subsequently hear this action. The statute conferring jurisdiction, 42 U.S.C.A. § 2000e-5(a), does contain the words, "Whenever it is charged in writing under oath by a person claiming to be aggrieved, . . ." The defendant Local 192 relies heavily on the words, "under oath," contending they are jurisdictional in nature. However, these words have been held to have an administrative meaning. "When the statute is thus considered, it is clear that the requirement for verification of charges lodged with the Commission relates solely to the administrative rather than to the judicial features of the statute." Choate v. Caterpillar Tractor Co., 402 F.2d 357, 359 (7th Cir. 1968). Verification of the statement is required by the EEOC for its protection, not for the protection of the Court.

> "If the Commission undertakes to process a charge which is not 'under oath', we perceive no reason why the district court should not treat the omission of the oath as a permissive waiver by the Commission. To deny relief under these circumstances would be a meaningless triumph of form over substance." *Choate, supra,* at 360.

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The Commission's decision to act on and process an unsigned letter alleging discrimination constitutes a waiver of the "under oath" verification requirement. McGriff v. A. O. Smith Corporation, 51 F.R.D. 479 (D.S.C.1971).

In the same jurisdictional vein, Local 192 maintains that a failure by the EEOC to serve a copy of the charge, tendered by the plaintiff Russell, on Local 192 destroys the viability of this action. The Local cites Long v. Georgia Kraft Co., et al, 1 FEP Cases 719 (N.D.Ga.1969) for the proposition that while it may be conceded that actual conciliation by the EEOC need not be conducted, the opportunity for conciliation has been held to be essential. The Local urges the view that it never received statutory notice of the charge filed by Edgar Russell, and was therefore unprepared to defend itself against any such charge.

This jurisdictional defense is almost entirely lacking in substance. Local 192 has plucked one isolated case from a veritable thicket of contradictory cases to bolster its assertion. Elucidation is found in Holliday v. Railway Express Company, Inc., 306 F.Supp. 898, 901 (N.D.Ga. 1969).

> "Third, the failure of the Commission to supply respondents with a copy of the charges should not be a fatal bar to private action in federal court. Mondy v. Crown Zellerbach Corp., 271 F.Supp. 258 (E.D.La. 1967), rev'd on other grounds, . . . International Brotherhood of Electrical Workers Local Union No. 5 v. United States EEOC, 398 F.2d 248 (3d Cir. 1968), cert. denied, 393 U.S. 1021, 89 S.Ct. 628, 21 L.Ed.2d 565, reversing 283 F.Supp. 769 (W.D.Pa. 1967). One judge in this district has held to the contrary. Long v. Georgia Kraft Co., 71 LRRM 2016 (N.D.Ga.1969); Long v. Georgia Craft Co., 71 LRRM 2018 (N.D.Ga.1969), in two holdings with which this

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Court must respectfully disagree. There are but a few jurisdictional prerequisites to suit, among which are a charge properly filed with the Commission against the parties named in the civil suit, and receipt by the complainant of statutory notice that the Commission has been unable to secure voluntary compliance through conciliation, followed by a filing within 30 days. Mickel v. South Carolina State Employment Service, 377 F.2d 239 (4th Cir. 1967), cert. denied, 389 U.S. 877, 88 S.Ct. 177, 19 L.Ed.2d 166; . . . Choate v. Caterpillar Tractor Co., 402 F.2d 357 (7th Cir. 1968)."

It is found that the "opportunity to conciliate," for which Local 192 pleads, is the opportunity for the EEOC to exercise its powers. Penalizing the plaintiff because of a failure by the EEOC to exercise its statutory duty is legally unacceptable. Tippett v. Liggett & Myers Tobacco Company, 316 F.Supp. 292 (M.D.N.C.1970); Younger v. Glamorgan Pipe and Foundry Company, *supra;* Choate v. Caterpillar Tractor Co., *supra.*

It is concluded as a matter of law that even if there were a failure by the EEOC in the instant case to present Local 192 with a copy of the charge filed by the plaintiff, Edgar Russell, such fact has no bearing on the facts establishing jurisdiction in this case.

Further, Local 192 contends that since the collective bargaining agreement was negotiated by a tripartite union board made up of the Reidsville, Durham, North Carolina, and Richmond, Virginia locals, the other locals are indispensable parties. This issue was decided adversely to the Union's contentions on January 20, 1971, at which time this Court granted permission to the other locals to intervene if they felt their rights were being threatened. This case in its present form does not suffer from a nonjoinder of parties defendant.

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CLASS OF AFFECTED EMPLOYEES.

By Order entered April 10, 1969, the Court held this to be a proper class action in the following language:

> "IT IS, THEREFORE, ORDERED that the plaintiffs may prosecute this proceeding as a class action pursuant to Rule 23(a), (b)(2) of the Federal Rules of Civil Procedure. Since this proceeding falls within the provisions of Rule 23(b)(2), no notice to members of the class need be given at this time.
> "The Court further finds and hereby orders that the class here involved are all Negroes who are employed by the defendant company at its Reidsville plant and who might subsequently be employed by the defendant company at its Reidsville plant and who are affected by any racially discriminatory policies or practices of the defendant company and defendant union at the Reidsville plant, should the Court find any such practices in the defendant company's plant in Reidsville, North Carolina. The Court further finds that the class also consists of Negroes who have not applied at the defendants Reidsville plant because of any racially discriminatory practices, if the Court finds any such practices to exist.
> "This ruling is conditional and may be amended, modified or altered at any time prior to final determination of this cause on the merits."

Pursuant to this conditional Order, and the findings made herein, the class applicability is modified to some extent.

The defendant Company maintains separate lines of seniority in its Branch and in its Leaf Department. However, these two operations are completely separate and distinct operations. In view of the physical distance be-

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tween the two facilities, the difference in the types of work done at the two facilities, and the efficiencies derived by keeping the two operations separate and distinct, it is found that the two lines of seniority should not be merged and that there is no justification in law or in fact for merging the two lines of seniority.

Having found that there is no basis in fact or law for merging the lines of seniority at Branch and Leaf, it is found that there has been no discriminatory hiring at Leaf. Because of the equality of opportunity to be hired either at Branch or Leaf, blacks who work at Leaf would be excluded from the class, except for the finding that promotion to supervisory levels at Leaf has been administered in a discriminatory fashion. The class shall include those blacks at Leaf who have been discriminated against because of the supervisory selection process. In so doing, any contention that Branch and Leaf are nothing more than two departments in the American Tobacco Company is specifically rejected.

The class of affected employees at Branch is defined as all black persons employed by the American Tobacco Company at Branch prior to January 1, 1955, and who continued to be so employed between July 2, 1965, and May 27, 1968, and who were denied a promotion in preference to a junior (in point of employment date seniority) white employee because of the criterion of "qualifications" used in selecting persons for promotion between 1963 and May 27, 1968.

There was no hiring between 1955 and 1965 at Branch. Black persons hired since 1965 are not affected by the use of the "qualifications" criterion because they are junior to all the other employees, white and black, and could not have advanced even if the Company had promoted on straight employment date seniority.

The class must also include black machine operators who

were bumped back from their jobs because they had not reached the prevailing rate after the Company made the thirty-five day prevailing rate proposal to representatives of the three eastern locals in October, 1968. This segment of the class will be limited to those machine operators who had worked on the machines thirty-five days before being pushed back.

SENIORITY SYSTEM

Prior to October, 1963, hourly paid employees of the Company were represented by racially segregated local unions. The defendant Local was the bargaining agent for white employees in jobs under its jurisdiction in Leaf and Branch. Jobs in Fabrication were filled predominantly by whites and thus came under the jurisdiction of the defendant Local; jobs in Pre-fabrication were filled predominantly by blacks.

At all times material to this action all of the Company's regular employees, Leaf and Branch, were covered by a single collective bargaining agreement and all of the Company's seasonal employees were covered under a separate labor agreement.

In the late 1950's the Company, due to modernization and automation, eliminated approximately thirty jobs in Pre-fabrication and the black employees displaced were transferred to jobs previously held by white employees in Fabrication. This movement was temporary, and in accordance with an oral agreement between the Company and the two segregated locals, the blacks who had been transferred to Fabrication were transferred back to Pre-fabrication.

In October, 1963, the two previously segregated locals merged into the defendant Local 192. Prior to the merger of the locals, promotions were made on the basis of jobs and departmental seniority; employees in Fabrication

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could only exercise seniority in jobs in Fabrication; jobs in Fabrication constituted one line of seniority and jobs in Pre-fabrication constituted a separate line of seniority.

More specifically, prior to 1963, the Company used a combination of departmental seniority and plant seniority. Departmental seniority was used to determine promotions. Plant seniority was used to govern lay-off and recall. The 1962 Agreement provided only that "all promotions and demotions shall be made in accordance with seniority provided that, in the opinion of management, there is no question as to the qualifications and efficiency of the employee concerned." After the merger of the locals, the defendants established a single line of seniority for Branch, and promotions made within the Branch were made on the basis of seniority and qualifications. This was done in accordance with the 1962 collective bargaining agreement as amended by the agreement dated March 10, 1964. Until late 1966, the selection of personnel to be promoted was accomplished by means of a canvass among the employees from senior to junior until the job or jobs were filled.

Between 1966 and May 27, 1968, permanent promotions within the Branch were made on the basis of seniority and qualifications, but the availability of jobs or job openings was posted on the bulletin boards within the Branch and employees desiring those jobs signed these postings rather than being canvassed.

Beginning May 27, 1968, promotions within the Branch were made on the basis of seniority alone and the criterion of "qualifications" was not used. Job availability was posted on the bulletin boards for signing by persons desiring such jobs.

In May, 1964, approximately ninety employees retired under the Company's early retirement plan. Most, if not all, of these employees were white employees who held

jobs of making or packing machine operator. As a result of these retirements, a number of vacancies in pipeline jobs (which have to be manned to produce any cigarettes at all) were created. A number of employees, most if not all of whom were white, were pushed back to lower paying jobs in the pipeline. These employees were given a special classification, sometimes referred to as "Group II" employees. These employees, by virtue of an oral agreement between the Company and the Union, were given the right to return to their former jobs as openings occurred, notwithstanding the fact that transfer back to their former jobs might involve promoting them over black employees having greater plant seniority. All of the Group II employees were ultimately promoted back to his or her old job, a higher paying job, or retired or have decline the offer to return. Of the fifty-one employees in Group II identifiable by the Company, twenty-seven were promoted back to his or her old job or a higher paying job after the effective date of the 1964 Civil Rights Act, July 2, 1965.

Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971), cert. dismissed 404 U.S. 1006, 92 S.Ct. 573, 30 L.Ed.2d 655 (1971), roundly condemned any seniority system which, though neutral on its face, serves to perpetuate the effects of past racial discrimination in hiring. A seniority system must be bona fide.

> "(h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an inten-

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> tion to discriminate because of race, color, religion, sex, or national origin. . . .'' 42 U.S.C. § 2000e-2(h).

The business purpose to be served in the instant case was that personnel who had previously served on making and packing machines would not require training. The Company characterized the pushback as temporary by promising those affected employees that they would return to their jobs in Fabrication as soon as possible. The predominantly white Fabrication side became so because of racially discriminatory hiring which occurred before the 1964 Civil Rights Act. When the character of the work force had to be changed in 1964 and 1965, the proper course of action would have been a permanent pushback, with the most senior employees returning to the Fabrication jobs when they again opened. This would, of course, have disappointed the hopes of those white workers who had attained the more advantageous Fabrication jobs through discriminatory pre-Act hiring. The seniority system cannot be held bona fide simply because it would have kept the morale, and therefore, efficiency, of at least the white employees at a high level.

> "However, Title VII guarantees that all employees are entitled to the same expectations regardless of 'race, color, religion, sex, or national origin.' Where some employees now have lower expectations than their co-workers because of the influence of one of these forbidden factors, they are entitled to have their expectations raised even if the expectations of others must be lowered in order to achieve the statutorily mandated equality of opportunity.'' *Robinson, supra,* at 800.

The use of "seniority and qualifications" to return white employees with less seniority to preferred jobs in Branch

over more senior blacks, did not constitute a "bona fide" seniority system.

The March 10, 1964, amendment to the 1962 collective bargaining agreement, which has been previously referred to, provided that promotions and demotions would be made without regard to race, color, creed or national origin. The 1962 agreement was further modified by letters of understanding on October 27, 1964, which restated the amendment adopted on March 10, 1964, except that the October 27 amendment added "except as otherwise agreed to by the Company and the appropriate Union local or locals." The effect of the letters of understanding was purportedly to disestablish departmental seniority in Branch, and to establish a single line of seniority for Leaf.

Several black employees were promoted to positions in Fabrication between 1965 and 1968 as a result of the letters of understanding executed on October 27, 1964. However, a number of black employees were placed back in their old positions during this time because they had not reached the prevailing rate, the top pay for the position. Historically the rate progression required twelve months to reach the prevailing rate.

During the course of a meeting between the Company and Local in March, 1968, the Company proposed to modify the prevailing rate and qualification schedule for the positions, among others, of maker, packer, container packer and filter rod machine. The Company's proposal provided that if an employee had worked in a job classification for a period of thirty-five working days, he could receive the prevailing rate for the position as well as exercise his plant seniority for both temporary and permanent cut backs. The Company's position in proposing the thirty-five day provision was that the Company would be able to determine within this period whether an employee had the ability to learn the job. The Local opposed the thirty-five

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day proposal, apparently because earlier employees had to work twelve months to reach prevailing rate. The Union, which is predominantly white, found itself in the position of protecting its white members who felt that a reduction in the time to reach prevailing rate unduly burdened them.

Generally stated, there may be instances in which discriminatory policies, i.e., those that prefer one choice over another, may not be illegal, but only in the case of a legitimate business necessity. "When an employer or union has discriminated in the past and when its present policies renew or exaggerate discriminatory effects, those policies must yield, unless there is an overriding legitimate, nonracial business purpose." Local 189, United Papermakers and Paperworkers, AFL-CIO v. U. S., 416 F.2d 980, 989 (5th Cir. 1969), cert. denied 397 U.S. 919, 90 S.Ct. 926, 25 L. Ed.2d 100 (1970).

The evidence has indicated that the thirty-five days to reach prevailing rate as suggested by the Company is adequate for the Company to make a determination of suitability for the job. The decision to reduce prevailing rate period from twelve months to six months instead of thirty-five days resulted from Union pressure.

> "Avoidance of union pressure also fails to constitute a legitimate business purpose which can override the adverse racial impact of an otherwise unlawful employment practice. The rights assured by Title VII are not rights which can be bargained away—either by a union, by an employer, or by both acting in concert." Robinson v. Lorillard Corp., *supra,* 444 F.2d at 799.

There is not a sufficient showing of a business necessity to justify the discrimination which resulted from reducing the period to reach prevailing rate from twelve months to six months, instead of thirty-five days as proposed by the Company.

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SCREEN TESTING

Plaintiffs contend that the use of screen tests for selections to fill craft positions is discriminatory. Before the screen tests were compiled and their use was instituted, employees in the craft positions, i.e., Schmermund Box adjusters, air conditioning operators, machinists, electrical technicians, and millwrights were hired from outside the Company. Persons trained in the requisite crafts were hired when positions became open.

According to the testimony of Mr. William G. Springs, Chief Engineer, Construction and Maintenance, this practice changed around 1956 when the Branch operation of the Company bought Accuray machines to measure the density of cigarettes through electronic use of nuclear materials. Mr. Springs interviewed and questioned prospective Accuray technicians from among the then presently employed workers at Branch. The positions were filled satisfactorily through use of this "in-house" qualification testing program. Thus was born the screen testing program, which plaintiffs contend constitutes a continuing discriminatory practice.

Section 703(h) of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-2(h) provides as follows:

> "[N]or shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin."

The plaintiffs urge upon the Court that the decision in Griggs v. Duke Power Company, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971) necessitates a ruling in the instant case that the defendant Company's screen tests are unlawful in their application to black employees. Guidance

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in delineating the perimeters of *Griggs, supra,* is found in the words of Mr. Chief Justice Burger, who delivered the opinion of the Court:

> "We granted the writ in this case to resolve the question whether an employer is prohibited by the Civil Rights Act of 1964, Title VII, from requiring a high school education or passing of a standardized general intelligence test as a condition of employment in or transfer to jobs when (a) neither standard is shown to be significantly related to successful job performance, (b) both requirements operate to disqualify Negroes at a substantially higher rate than white applicants, and (c) the jobs in question formerly had been filled only by white employees as part of a long-standing practice of giving preference to whites." *Griggs, supra,* at 426, 91 S.Ct. at 851.

Griggs is doubly distinguishable from the instant case in that this Court is not now concerned with the requirement of a high school education or the passing of a general intelligence test, nor have the plaintiffs shown that the present requirements operate to disqualify Negroes at a substantially higher rate than whites.

The figures relevant to the craft positions at the time of the taking of depositions in 1969 reveal that of fifty-nine craft positions, none were held by Negroes. The Company cannot and does not contest these raw statistics. Theirs is not so to do. The burden of proof rests squarely with the plaintiff to show some discriminatory effect from a test requirement before the Court need consider the issue of job relatedness. Broussard v. Schlumberger Well Services, 315 F.Supp. 506, 512 (S.D.Tex. 1970) held the following:

> "Plaintiffs argue for what, in effect, amounts to a *per se* rule that the use of a test that has not been

> professionally validated as to job relatedness is a discriminatory practice. . . . However, in the absence of a showing of a discriminatory effect of the testing requirement upon Negroes as a class any further discussion of job relatedness would be fruitless."

United States v. H. K. Porter Company, 296 F.Supp. 40, 76, 77 (N.D.Ala. 1968) held:

> "For a court to find racial discrimination in the use of aptitude tests which have not been validated, there should be at least some evidence that the use of an aptitude test which has not been validated has resulted in discrimination and not merely the abstract proposition that test validation is desirable."

The plaintiffs contend that there can be no question that the tests used by the Company operate to exclude Negroes in the sense referred to in *Griggs*. Evidence substantiating such an argument would be of far greater import than the bald assertion.

Discriminatory effect is the whole cornerstone to any decision concerning employment practices such as testing requirements. Discussions of business necessity, intent and job relatedness are largely academic in the absence of discriminatory effect.

The plaintiff has produced only raw figures for this Court. There has been no showing of the percentage of blacks or whites who passed or failed the test. There has been no showing that as a result of the institution of written examinations as a condition of job transfers that blacks were excluded from employment opportunities in a disproportionate number of cases over whites. There has been no definitive showing of proportions whatsoever. The burden of proof does not shift to the Company to prove business necessity or job relatedness.

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Even so, it is found that the screen tests used by the Company as conditions to transfer to craft positions are job related and valid.

The plaintiffs contend that the EEOC Guidelines interpreting § 703(h) of the 1964 Civil Rights Act are to be followed verbatim by this Court. For support, Griggs v. Duke Power Co., *supra,* 401 U.S. at 433-434, 91 S.Ct. at 854 is cited as follows:

> "The Equal Employment Opportunity Commission, having enforcement responsibility, has issued guidelines interpreting § 703(h) to permit only the use of job related tests. The administrative interpretation of the Act by the enforcing agency is entitled to great deference."

Griggs, supra, does command that the EEOC Guidelines be treated deferentially, but the perimeters of this deference are limited by a close reading of *Griggs,* to the requirement that tests be job related. The geometric progression of reasoning by which the plaintiff insists that the tests must have been professionally developed and validated is laudable, if not logical. United States v. H. K. Porter Company, *supra,* 296 F.Supp. at 76, refutes the plaintiffs' contention:

> "If this statute [703(h)] is to be construed as requiring test validation, the important aspect of the matter is not to be able to say that it has been conducted by a professional psychologist but to be satisfied that it has been conducted fairly and properly. Moreover, the Court received the firm impression from hearing the witnesses testify on the subject that because familiarity with the duties of jobs and with the job performance of employees are essential elements in a test validation, a layman having this knowledge

and some experience in testing would be qualified to conduct a test validation."

The plaintiff infers that only a trained psychologist or industrial tester can validate a testing program. This might be so if the various types of validity are given their tightest textbook interpretation. However, content validity means nothing more than "a piece of the job." Mr. William G. Springs, who prepared the tests, is intimately familiar with the requirements which each job in the crafts places on its holder. As Chief Engineer, Construction and Maintenance, he is directly responsible for the training and production of employees in the crafts. He knows what is required of an employee and what is required of the job. From careful scrutinization of the tests prepared by Mr. Springs, the Court is convinced that the tests are an accurate measure of the skills required for the job to which each test is oriented. The Court finds that the tests are not in the nature of general intelligence tests, but rather are sharply oriented to the job being tested for. They are job related. The use of screen tests by the Company has not been a discriminatory practice.

This Court finds from the evidence that the use in the past of the screen tests are not discriminatory. Nevertheless, to prevent future discrimination, the Court enjoins the future use of screen testing by the Company or the use of present lists compiled from previous administrations of the tests. To be used henceforth, such tests must be validated in accordance with the requirements of the "Guidelines of Employee Selection Procedures" published by the United States Equal Employment Opportunity Commission.

Screen testing is a highly complex and technical matter with its attendant administrative intricacies. In this case, there is no question that the tests employed are job re-

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lated. However, exercising an abundance of caution to assure fairness, the Court adopts the EEOC Guidelines on validation for future validation of tests by the Company. United States v. Jacksonville Terminal Co., 451 F.2d 418, 456 (5th Cir. 1971), held, "Certainly the safest validation method is that which conforms with the EEOC Guidelines 'expressing the will of Congress.' "

SUPERVISORY PERSONNEL

The Company has the sole authority for the selection of persons for supervisory positions.

The policy of the Company concerning the hiring of supervisory personnel for Branch employment is to hire by qualifications. The Company obtains its supervisory personnel for the Branch in two different ways. Some employees are promoted from hourly rated jobs to supervisory positions. Other supervisory personnel are hired from without the Company. The Company canvasses colleges in search of suitable trainees for supervisory positions.

There are no written qualifications for foremen employed by the Branch, and persons for such positions are selected by management based up an applicant's ability to learn the job, his age, his knowledge of the operation, his ability to get along with people, and sufficient educational background to enable him to keep records.

As of January 29, 1968, there were fifty-three persons employed in supervisory positions in Branch. Of these forty-nine were white (thirty-one foremen, eighteen assistant foremen); four Negroes occupied the position of assistant foreman and they were assigned to Pre-fabrication.

The Leaf Department hires its supervisory personnel by one of two methods. Management of the Leaf Department either promotes an hourly paid employee through the ranks

to a supervisory position, or a person is hired from without the Company for a supervisory job after interviews and from applications. The last person hired from without the Company as the result of an application for a supervisory position was in 1965.

The Leaf Department employs both black and white supervisors, and these supervisors have occasion to supervise the work of both black and white employees. The Leaf Department's first black supervisor was promoted to that position in 1957, and he has since retired.

As of January 29, 1968, there were 200 black employees in Leaf (76 regular, 124 seasonal), of which 3 occupied the position of assistant foreman. They were 63 white employees in Leaf (60 regular, 3 seasonal), of which 27 occupied the position of foreman (18) or assistant foreman (9). Since January, 1969, one black assistant foreman has been promoted to the position of foreman.

Plaintiffs contend that the statistical evidence in this case establishes that the Company has engaged in racial discrimination in the hiring and promotion of supervisory personnel. The Company maintains that, statistical evidence notwithstanding, the plaintiffs have failed to show that in any way the Company has discriminated against blacks in the selection of supervisory personnel.

Plaintiffs rely heavily on Brown v. Gaston County Dyeing Machine Co., 457 F.2d 1377 (4th Cir. 1972), and Rowe v. General Motors Corp., 457 F.2d 348 (5th Cir. 1972). *Brown, supra,* reiterates the present importance of statistical evidence in establishing patterns of discrimination. In *Brown,* the defendant's lack of objective standards for hiring, pay increases within job classifications, and for promotion from one job to another lost any innocuousness in the face of statistics indicating that race was the only identifiable factor that could explain the disparity between em-

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ployees. "Elusive, purely subjective standards must give way to objectivity if statistical indicia of discrimination are to be refuted." *Brown, supra,* at 1382.

In *Rowe, supra,* the lack of any written objective criteria to aid supervisors in their recommendations of hourly employees to salaried positions coupled with the absence of safeguards to prevent discriminatory action was cited to the court. There was a holding of discrimination by the court after it considered the above factors in the light of discriminatory statistics. Relief was ordered by the court.

In the instant case, the figures from the Leaf operation can hardly be surpassed. Of 63 white employees in Leaf (60 regular, 3 seasonal), 27 are foremen. Only 33 regular white employees are not supervisors. Therefore, 45 per cent of all regular whites are supervisors. In considering the same figures for blacks, there are 3 supervisors of 200 black employees (76 regular, 124 seasonal). Out of 76 blacks, 3 are supervisors. Even figuring it out to one decimal point, only 3.9 per cent of the regular blacks are supervisors. These figures would chafe the conscience of this Court, even if objective criteria were fully in use, which has not been demonstrated. The lack of objective guidelines and written criteria are some indicia of discrimination.

These figures were applicable through January 29, 1968, when depositions were taken. The Company's memorandum states that at the time of trial, there were two black supervisors and seventeen white. These figures are indeed not as damning if taken to mean that 2/19 or approximately 11% of all supervisors in Leaf are black. However, the number of black and white supervisors must be considered in light of the number of employees of the respective race.

It is, therefore, held that the Company's Leaf operation has discriminated against blacks in promotion to

supervisory positions in violation of the Civil Rights Act of 1964 and a suitable injunction should issue. Formulation of objective criteria for promotion to supervisory positions is hereby mandated.

In the Branch operation, the statistical pattern is different. As of January 29, 1968, Branch had 1408 whites and 232 blacks. There were 49 white supervisors and 4 black supervisors. Blacks made up approximately 14% of the work force and approximately 8% of the supervisory force. These figures do not mandate a finding of discrimination in promotion to supervisory positions in Branch. Here again though, objective criteria for promotion would be desirable.

Facilities

The plaintiffs produced no evidence that there is any segregation by race in respect to toilets, locker rooms, medical facilities, cafeterias and other facilities. On the contrary, there was affirmative evidence that facilities have not been segregated on the basis of race since well before the effective date of the Act. The toilet facilities were integrated in 1961. The cafeteria and medical facilities were integrated in 1962.

Pay and Classifications

The Company does not and has not, since the effective date of the Act, classified certain jobs as "skilled," others as "semi-skilled," and others as "unskilled" insofar as pay and assignments are concerned.

All employees of the Company are paid on the basis of the job classification under which their work is performed in accordance with the rate schedules negotiated between the Company and the Union and there is no distinction

in the pay rates or the amount actually paid by reason of the race or color of any employee. Blacks and whites are paid the same amount for the same work.

EDGAR RUSSELL

An intensive examination of the voluminous evidence compiled at trial pertaining to the many personal complaints of Mr. Russell reveals that most of the complaints are more fiction than truth. A harmonious work relationship with one so easily offended would indeed be difficult. The allegations of racially motivated personal harassment is not established by the record.

CONCLUSIONS OF LAW

1. This Court has jurisdiction of this action under the provisions of Section 706(f) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(f).

2. The defendant, The American Tobacco Company, is an employer in an industry affecting commerce within the meaning of Section 701(b) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(b).

3. Local 192 Tobacco Workers International Union AFL-CIO is a labor organization engaged in an industry affecting commerce within the meaning of Sections 701(d), (e), of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(d), (e).

4. The plaintiffs have complied with the procedural requirements of Sections 706(a), (d), and (e) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(a), (d), (e).

5. This action is properly maintained as a class action under Rule 23(a), (b)(2) of the Federal Rules of Civil Procedure. The class is as hereinbefore defined.

6. The use of the criteria "seniority and qualifications" instead of straight employment date seniority by the defendants until May 27, 1968, in promotions and transfers in the Branch operation of the American Tobacco Company in Reidsville, North Carolina, constituted discrimination against members of the affected class and an unlawful employment practice in violation of Sections 703(a) and (c) of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2(a) and (c).

7. The practice or policy of the defendants in using or acquiescing in the use of a six-months period to reach prevailing rate instead of the thirty-five day period first proposed by the defendant American Tobacco Company in 1968, constitutes discrimination against members of the affected class and an unlawful employment practice in violation of Sections 703(a) and (c) of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2(a) and (c).

8. The absence of objective criteria to aid in the selection of supervisory personnel in the Leaf operation of American Tobacco Company in Reidsville, North Carolina, has constituted a deprivation of employment opportunities and an unlawful employment practice in violation of Section 703(a) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a).

9. The use of screen testing by The American Tobacco Company in its Branch operation has constituted neither discrimination nor an unlawful employment practice and the use of such testing has comported with Section 703(h) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(h). From the time an order is entered, use of screen testing by American Tobacco Company in Reidsville, North Carolina, or of any lists of successful test applicants will con-

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stitute discrimination and an unlawful employment practice in violation of 42 U.S.C. § 2000e-2(a), unless and until such time as the screen tests to be used have been professionally validated in accordance with the requirements of the "Guidelines of Employee Selection Procedures" published by the United States Equal Employment Opportunity Commission.

10. Defendants have intentionally engaged in the unlawful employment practices described in Conclusions 6, 7, and 8 above and are intentionally engaging in the unlawful employment practices described in Conclusions 7 and 8, within the meaning of Section 706(g) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(g).

11. None of the unlawful employment practices in Conclusions 6, 7, and 8 above resulted from a bona fide seniority or merit system within the meaning of Section 703(h) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(h).

12. This Court is authorized by Section 706(g) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(g) to enjoin the discriminatory practices described herein and to order other appropriate affirmative relief in the nature of back pay.

An Order will be entered in accordance with these Findings.

Consistent with these Findings, counsel for the plaintiffs will prepare and present to this Court an appropriate order which shall provide for the implementation in the Reidsville, North Carolina, plant of the defendant Company the proposal by the Company during the 1968 negotiations for a thirty-five day period to reach prevailing rate, where applicable, and in the Rockingham County, North Carolina,

Leaf operation of the Company, a system of objective criteria to aid in the selection and promotion of supervisory personnel.

Further, the order will provide that within thirty days after the order counsel for the plaintiffs will submit to the Court suggested methods by which back pay may be computed for each member of the affected class with special attention to instructions that should be given a special master should the Court decide to appoint a special master. The defendants shall have twenty days thereafter in which to file countersuggestions.

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Order, March 8, 1974, U.S.D.C., Middle District North Carolina.

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

GREENSBORO DIVISION

No. C-2-G-68

ORDER

EDGAR RUSSELL, FREDERICK D. BROADNAX, ALVIS MOTLEY, JR., JAMES R. VAUGHN, LAWRENCE PRICE, JR., GLEN A. LEE, HAYWOOD GILLIAM and JAMES R. KAYLOR,

Plaintiffs,

v.

THE AMERICAN TOBACCO COMPANY and LOCAL 192, TOBACCO WORKERS' INTERNATIONAL UNION, an affiliate of AFL-CIO,

Defendants.

This cause having come on for trial before the Court, sitting without a jury, in November, 1971, and the issues having been duly tried, and Findings of Fact and Conclusions of Law having been entered by the Court on January 18, 1973, it is ORDERED, ADJUDGED AND DECREED:

The defendants, The American Tobacco Company ("the Company") and Local 192, Tobacco Workers' International Union, AFL-CIO ("Local 192"), their officers, agents, employees and servants and all persons in active concert or participation with them are hereby permanently enjoined and restrained from discriminating against the affected class of black employees of the Company as herein described because of their race in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. at the Company's facilities located in the City of Reidsville and Rockingham County, North Carolina.

Order, March 8, 1974, U.S.D.C., Middle District North Carolina.

1. *The Affected Class.*

A. The affected class for purposes of this Order shall include:

(i) All black persons employed by the defendant American Tobacco Company at Branch prior to January 1, 1955, and who continued to be so employed at anytime between July 2, 1965, and May 27, 1968, and who were denied a promotion in preference to a junior (in point of employment date seniority) white employee because of the criterion of "qualifications" used by the Company in selecting persons for promotions between October, 1963, and May 27, 1968;

(ii) All black persons who had worked as machine operators for 35 or more days and who were bumped back from their jobs at anytime from October, 1968, to the present because they had not reached the prevailing rate; and

(iii) All black persons at Leaf who have been discriminated against because of the Company's racially discriminatory supervisory selection process.

2. *The Seniority System.*

A. *Branch.*

(i) The defendants are enjoined from implementing, maintaining or giving effect to any seniority system, whether pursuant to any collective bargaining agreement or otherwise, which is designed to, or has the effect of, discriminating against members of the affected class who are employed in the Branch operation of the Company, including the use of any criteria of "seniority and qualifications," insofar as such system governs promotions, layoffs and push-backs.

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(ii) The defendants are hereby ordered to continue to implement and to continue permanently a system of plant seniority with respect to job assignments, promotions and push-backs of Branch employees in the affected class where the qualifications of competing employees are relatively equal.

(iii) Plant seniority as used herein is the length of service from the most recent date of permanent employment.

(iv) The injunction and prohibition contained herein shall not be deemed to proscribe the continuation by the Branch of the eight lines of progression now being used where stipulated prior experience is a prerequisite for certain jobs. That is to say, the following work rules have not been found to be discriminatory and the continuation of the following work rules is not prohibited:

(a) An employee must have reached the prevailing rate as a learner adjuster before he is eligible to bid for the job of adjuster.

(b) An employee must have reached the prevailing rate as an operator before he is eligible to bid for the job of learner adjuster.

(c) An employee must have reached the prevailing rate as a catcher before he is eligible to bid for the job of examiner-making.

(d) An employee must have reached the prevailing rate as a line searcher before he is eligible to bid for the job of examiner-packing.

(e) An employee must have reached the prevailing rate as assistant adt dryer operator before he is eligible to bid for the job of adt dryer operator.

(f) An employee must have reached the prevailing rate as assistant textile dryer operator before he is eligible to bid for the job of textile dryer operator.

(g) An employee must have reached the prevailing rate as a making or packing adjuster before he is eligible to bid for the job of overhaul adjuster-making or packing.

(h) An employee must have reached the prevailing rate as either assistant adjuster or oiler before he is eligible to bid for the job of prefabrication adjuster.

The selection processes where the upgraded job is open only to an employee who has had some stipulated prior experience in some other job, as listed above, has not been found to be discriminatory, and such promotions are not to be considered within the perimeters of the injunction above set forth.

B. *Leaf.*

(i) All Claims by plaintiffs for relief regarding alleged racially discriminatory employment practices, including alleged discriminatory administration of the seniority system, in Leaf are denied.

(ii) The only relief granted to plaintiffs in connection with their allegations of racially discriminatory practices in Leaf is the relief granted herein with respect to the selection of supervisory personnel in Leaf, and the employees in Leaf within the class adversely affected are defined above, in Paragraph 1.A.(iii).

3. *The Thirty-Five Day Prevailing Rate Provision.*

A. The defendants are hereby enjoined from implementing, maintaining, continuing or giving effect to or acquiescing in any policy or practice, whether pursuant to a

collective bargaining agreement or otherwise, which requires Branch employees of the affected class to perform machine operator jobs for a period of six months before they reach the prevailing rate for that job and before they are entitled to utilize their plant seniority for all purposes for which senioriy is used.

B. Any employee at the Branch who successfully bids or signs a post for an opening on automatic machinery (such as makers, packers, boxers, container packers, filter rod machine, etc.) and who qualifies for such job within thirty-five working days shall, at the end of thirty-five working days on the particular machine, immediately receive the top prevailing rate the job carries and the plant-wide seniority of that employee shall then become effective with respect to all cut backs, whether temporary or permanent, and any employee who has thus qualified on a job by successfully completing the thirty-five working days shall not be cut back (whether permanently or temporarily) except by plant-wide seniority.

4. *Testing.*

The Court has found from the evidence that the Company's use of certain screening tests for craft jobs are job related and do not have an adverse impact on the employment opportunities of black employees of the Company. However, the Court, in order to assure fairness to black employees in the future hereby orders the Company, from the time this Order is entered, to discontinue the use of any screening tests at its Reidsville, North Carolina operations, or of any lists of successful test applicants, unless and until such time as the screen tests to be used have been professionally validated in accordance with the "Guidelines on Employee Selection Procedures," promulgated by the United States Equal Employment Opportunity Commission.

Order, March 8, 1974, U.S.D.C., Middle District North Carolina.

5. *Supervisory Personnel.*

A. The Company is enjoined from implementing, maintaining or giving effect to any criteria utilized for the selection of supervisory personnel which is designed to or has the effect of discriminating against members of the affected class who are employees of the Leaf operations of the Company.

B. The Company is ordered to formulate objective criteria for promotion and to implement an affirmative action program for the selection of supervisory personnel in its Leaf operation which shall be designed to eliminate the racially disparate effect on affected class members in Leaf. The affirmative action program to be implemented shall consist of the Company taking the following action:

(i) The posting of notices on bulletin boards in conspicious places throughout Leaf announcing vacancies for supervisory positions.

(ii) The periodic posting on bulletin boards in conspicious places throughout Leaf of notices which shall contain information with respect to qualifications for consideration for promotion to supervisory positions.

(iii) In considering applicants from the affected class at Leaf for supervisory positions, management shall take into account the seniority standing of such applicant or applicants.

(iv) Management shall take into account punctuality, and regularity of attendance of any members of the class at Leaf who apply for a supervisory position.

(v) Management shall consider the ability of any affected class members at Leaf who apply for supervisory positions to work in harmony with their coworkers.

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(vi) The ability to write and the ability to follow written instructions, if they are requirements for supervisory positions, shall be specifically stated in all notices and shall be otherwise brought to the attention of members of the affected class at Leaf.

(vii) If any members of the affected class at Leaf apply for supervisory positions, management shall take into account the ability of those persons to reach production goals while serving in non-supervisory positions.

(viii) Management shall advise in writing all affected class members who have applied for supervisory positions and who have been rejected of the reasons of their disqualification.

C. The procedure outlined in Paragraph 5.B. above is in no way intended to be an exhaustive listing of non-racial, objective methods for the selection of supervisory personnel, and the Company is encouraged to utilize any other procedures for the selection of supervisory personnel in Leaf which are not designed to discriminate, or which do not have the effect of discriminating, against affected class members.

D. The Court has heretofore found that there has been no racial discrimination with respect to the selection of supervisory personnel in Branch and, accordingly, all claims by plaintiffs for relief in regard to alleged discriminatory practices at Branch in the selection of supervisory personnel are denied. However, the Court suggests that an affirmative action program similar to the one described in 5.B. above for the selection of supervisory personnel in Branch would be desirable to avoid possible future discrimination against black persons.

6. *Facilities.*

The allegations of the plaintiffs relating to racially segregated employees' facilities are not supported by the evidence, and the claims of plaintiffs for relief in this regard are denied.

7. *Edgar Russell's Individual Claim.*

All claims for relief by plaintiff Edgar Russell for alleged racially motivated personal harrassment by officials of the Company and the alleged failure of defendant Local 192 to process vigorously such grievances or to fairly represent him in dealing with the Company relating to his terms, conditions and privileges of employment are denied as the evidence does not support his allegations.

8. *Pay and Classifications.*

The Court has heretofore found that the Company has not, since the effective date of Title VII, classified certain jobs as "skilled" and others as "semi-skilled" insofar as pay and assignment are concerned; and the Court has found further that black and white employees are paid the same amount for the same work in accordance with the rate schedule negotiated between the Company and Local 192; therefore, all claims for relief with respect to these matters are denied.

9. *Back Pay.*

A. Black persons employed by the Branch prior to January 1, 1955, and who continued to be so employed between July 2, 1965, and May 27, 1968, and who were denied a promotion in preference to junior (in point of employment date seniority) white employees because of the criterion of "qualifications" used in selecting persons for promotion between October, 1963, when the white and black locals were merged, and May 27, 1968, shall be entitled to recover

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back pay from the defendants in an amount and for a period to be fixed by subsequent order of this Court.

B. The entitlement to back pay provided for above is based upon preferential promotion practices which favored junior whites over senior blacks, and shall not be construed so as to include those promotions made in which stipulated prior experience is a prerequisite for a particular job, as described in Paragraph 2.A. (iv), above, nor shall it be construed so as to include promotions awarded to persons successfully taking a screen test for a craft job.

C. Black machine operators who, after October 25, 1968, were bumped back from their jobs because they had not reached the prevailing rate, shall be entitled to recover back pay from the defendants in an amount and for a period to be fixed by subsequent order of this Court, but the black machine operators entitled to back pay hereunder shall be limited to those black machine operators who had worked on their respective machines for thirty-five days prior to the time they were bumped back, and shall exclude any black machine operators who were bumped back prior to the time such operator(s) had worked on his or her respective machine for thirty-five days.

D. Within thirty days after the entry of this Order, counsel for plaintiffs shall submit to the Court suggested methods by which back pay may be computed for each person described above in Paragraphs A. and C. of this Paragraph 9, with special attention to instructions that should be given a special master should the Court decide to appoint a special master. The defendants shall have twenty days thereafter in which to file counter suggestions, giving special attention to the apportionment of any back pay recovered as between the defendants.

E. At the time of filing the information required in Paragraph D. of this Paragraph 9 above, the parties may

set forth their contentions as to the period during which back pay should be considered, the rate of such pay, and any contentions with regard to omitting any persons from participating in such back pay or limiting the participation of any persons.

10. *Collective Bargaining Agreements.*

The collective bargaining agreement now in effect and all subsequent collective bargaining agreements shall remain in and continue to have full force and effect, except insofar as such agreements are inconsistent with the provisions of this Order. Should a conflict arise between the provisions of a collective bargaining agreement and the provisions of this Order, the terms of this Order shall prevail.

11. *Notice.*

The defendants shall give notice of this Order to all of their employees and members by posting copies of this Order on bulletin boards, located in conspicious places throughout the Company's operations in Reidsville, Rockingham County and throughout union facilities.

12. *Costs and Attorneys' Fees.*

A. Plaintiffs are awarded their costs of this action to be taxed against the defendants.

B. Plaintiffs are entitled to recover reasonable attorneys' fees and expenses as part of their costs of this action. In the absence of agreement between the parties, plaintiffs are directed to file with the Court a statement of services rendered in connection with this case. The defendants shall have twenty days thereafter to file their comments on the submission of plaintiffs, giving special attention to the apportionment of costs and attorneys' fees as between the defendants.

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Order, March 8, 1974, U.S.D.C., Middle District North Carolina.

13. *Records and Reports.*

A. The Company shall maintain appropriate records of all actions taken pursuant to this Order, and shall allow counsel for the plaintiffs to inspect these records after fifteen days notice.

B. Over a period of two years the Company shall file with the Court and serve upon counsel for the plaintiffs a report each six months, beginning six months from the date of this order, said report to show the following information:

(1) The number of vacancies and the names, race and dates of employment of all persons considered for supervisory positions in Leaf and the name of each successful candidate.

(2) Any and all action, reports, and studies made by the Company or on behalf of the Company with respect to any screen tests which the Company may utilize as part of the selection process for craft positions.

14. *Retention of Jurisdiction.*

The Court retains jurisdiction of this matter to issue such other orders and to conduct such other proceedings as may be necessary to effectuate this Order.

A True Copy
Teste:
Carmon J. Stuart, Clerk
By: (Illegible)
March (??), 1974
Deputy Clerk

EUGENE A. GORDON
United States District Judge

Opinion, September 24, 1975, Fourth Circuit Court of Appeals.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 74-1650

EDGAR RUSSELL
FREDERICK D. BROADNAX
ALVIS MOTLEY, JR.
JAMES A. VAUGHN
LAURENCE PRICE, JR.
GLEN A. LEE
HAYWOOD GILLIAM
JAMES R. KAYLOR,

Appellants,

v.

THE AMERICAN TOBACCO CO. and LOCAL 192, TOBACCO WORKERS' INTERNATIONAL UNION, an affiliate, AFL-CIO,

Appellees,

UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Amicus Curiae.

BLEED THROUGH

Opinion, September 24, 1975, Fourth Circuit Court of Appeals.

No. 74-1652

EDGAR RUSSELL, et al.,

Appellees,

v.

THE AMERICAN TOBACCO CO., et al.,

Appellants.

Appeal from the United States District Court for the Middle District of North Carolina, at Greensboro. Eugene A. Gordon, Chief Judge.

(Argued January 7, 1975. Decided Sept. 24, 1975)

Before WINTER, BUTZNER, and FIELD, Circuit Judges.

Robert Belton and O. Peter Sherwood (Jonathan Wallas, J. LeVonne Chambers, Jack Greenberg, Morris J. Baller; Chambers, Stein, Ferguson and Lanning on brief) for appellants; Charles T. Hagan, Jr. (Daniel W. Fouts; Adams, Kleemeier, Hagan, Hannah and Fouts on brief) for The American Tobacco Company; Julius J. Gwyn (Gwyn, Gwyn & Morgan on brief) for Local 192, Tobacco Workers International Union; Margaret C. Poles, Attorney, Equal Employment Opportunity Commission (William A. Carey, General Counsel; Joseph T. Eddins, Associate General Counsel; and Beatrice Rosenberg and Charles L. Reischel, Attorneys, on brief) for amicus curiae.

Opinion, September 24, 1975, Fourth Circuit Court of Appeals.

BUTZNER, Circuit Judge:

These appeals involve only a narrow aspect of a class action in which the district court properly granted black employees broad relief under Title VII of the Civil Rights Act of 1964 against The American Tobacco Company and Local 192 of the Tobacco Workers International Union, AFL-CIO. The district court found that at the company's Reidsville, North Carolina, Branch (Branch), the use of departmental seniority, subjective qualifications, and an excessive probationary period for promotions, transfers, pushbacks, and layoffs had unlawfully excluded black employees in the prefabrication department from working in the fabrication department, where better paying jobs had generally been reserved for white employees. Accordingly, the court ordered that these matters be controlled entirely by plant seniority and by a reduced probationary period. It enjoined the use of screening tests not approved by the Equal Employment Opportunity Commission. It found no discrimination in the appointment of supervisors at Branch.

The district court also found that at the company's Leaf Department (Leaf) in nearby Rockingham County, there had been discrimination in the choice of supervisors. Therefore, it required objective criteria for selecting supervisors and affirmative action in appointing black employees to those positions. The court awarded back pay for some of the employees at Branch and Leaf. Neither the company nor the employees appeal these provisions of the decree.

The district court ruled that Branch and Leaf are separate operations because they are two miles apart, different work is done at each plant, and it is more efficient for the company to maintain their distinct identities. It concluded that "there is no justification in law or in fact for merging the two lines of seniority" at Branch and Leaf.

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Opinion, September 24, 1975, Fourth Circuit Court of Appeals.

The employees have appealed the denial of relief for Leaf employees. They also seek to enlarge the decree's provision for compliance reports. The union has filed a cross-appeal challenging the court's jurisdiction and complaining about the assessment of back pay.

For the reasons stated in Part I, we conclude that qualified black Leaf employees should be permitted to fill permanent vacancies in the fabrication department at Branch without sacrificing their company seniority and that they, like the black employees at Branch, are entitled to back pay. In Part II we affirm the court's order for reports. For the reasons stated in Part III, we find no cause for reversal in the union's cross-appeal. Accordingly, with appropriate modifications to provide a remedy for the employees at Leaf, we affirm the district court's decree.

I

The company's Leaf department receives, processes, and stores both domestic and Turkish tobacco for use at Branch. Its management is separate and independent from Branch's management. Leaf employs 106 regular workers, approximately 69 percent of whom are black, and 127 seasonal workers from July to the following January, 97 percent of whom are black. When this suit was filed in 1968, the average hourly wages were approximately as follows: white Branch employees, $2.90; regular black Leaf employees, $2.50; and seasonal black Leaf employees, $2.36.

The Reidsville Branch of the company receives tobacco from Leaf and makes it into cigarettes. Branch is organized into two departments—prefabrication and fabrication. Prefabrication receives tobacco from Leaf and blends, cuts, and dries it. The fabrication department manufactures filters and cigarettes, and packs, stores, and ships the finished products. Craft employees, such as electricians, tinsmiths, and welders, are classified in fabrication, but

they perform duties in prefabrication as well. Some of the black leaf employees also work at Branch, stemming tobacco.

The company's regular employees were formerly represented by racially segregated local unions. Local 192 was the bargaining agent for white employees, most of whom worked in Branch's fabrication department. The employees represented by the black union worked primarily in the Leaf department, in the prefabrication department, and as janitors in the fabrication department. Each union, and consequently, for practical purposes, each department, had a separate seniority roster. In October 1963, the racially segregated unions merged because of a directive from the United States Defense Supply Agency, issued pursuant to an executive order. The merger did not include seasonal employees, who continue to be represented by a separate union.

The merger, however, did not open the doors of the fabrication department to black employees. The district court found that through various practices both the company and the union discriminatorily preserved jobs in this department for white employees after the enactment of Title VII.

We agree with the district court that the seniority rosters of Branch and Leaf should not be merged. For example, it would be wasteful, as the appellants acknowledge, to use a merged seniority system to fill daily vacancies by shuffling employees between the plants. A company is entitled to the efficiencies it derives from maintaining separate departments and seniority rosters if this can be done without discrimination. *Cf.* United States v. Chesapeake & Ohio Ry. Co., 471 F.2d 582, 593 (4th Cir. 1972). But the inappropriateness of merging the seniority lists does not preclude permanent transfers of employees from Leaf to fabrication at Branch without loss of seniority.

If Branch and Leaf are both parts of the same operation, this case presents a straightforward application of the well-accepted principle that discriminatory hiring in departments of a business may be remedied by requiring the company to allow transfers between departments, based on plant-wide seniority. *See, e.g.*, Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971); Quarles v. Philip Morris, Inc., 279 F.Supp. 505 (E.D. Va. 1968). The district court found that the company and the union had discriminated against black employees in staffing Branch's fabrication department. Therefore, if Leaf is considered to be another department of the company's cigarette manufacturing operations in the Reidsville area, the remedy for the discrimination found by the district court should include allowing Leaf employees to transfer to the fabrication department without losing their seniority.

If, on the other hand, Leaf and Branch are different locations, and if differences in treatment of workers at the different locations are not due to an intention to discriminate, the company's refusal to allow Leaf employees to transfer on the basis of company-wide seniority would not violate the Act. This is so because 42 U.S.C. § 2000e-2(h) provides in part:

> "Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, . . . or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin. . . ."

Neither the Act nor the EEOC regulations define the statutory term "employees who work in different loca-

tions," and we deem it unwise to attempt to draft a definition for every situation. It is readily apparent, however, that the labor market is the most important criterion for determining whether a company's employees work in different locations. If the labor for each plant is recruited from different geographical areas, or if one plant requires labor possessing different skills from the labor employed at another company plant, it is obvious that the company cannot draw from the same labor market to man its plants. Under these circumstances, it generally can be said that the employees work at different locations. In contrast, if a company can operate two or more of its plants with employees from the same geographical area who are unskilled or possess the same skills, an applicant for a job can be assigned to an entry level position in either plant. Therefore, these employees, having been hired from the same labor market, would not generally fall within the statutory class of "employees who work in different locations."

In this case, the company draws from the same labor market for both Leaf and the fabrication department of Branch. The plants are only two miles apart, and employees come from the same geographical area. Moreover, there are entry level positions at both places that require neither particular skills nor experience. There are jobs in fabrication that can be filled just as well by an employee transferring from Leaf as by a person hired off the street or from the prefabrication department.

Other facts indicate that the employees at Leaf and Branch do not work at different locations within the meaning of the Act. The two plants constitute a single manufacturing process. All of Leaf's tobacco is used at Branch, and some of Leaf's employees work at Branch. The same office pays all employees, and the same bargaining agreement covers employees at both plants. The company has contractually reserved the right to shift employees from

one plant to the other without depriving the transferees of seniority, and it has exercised this right on several occasions. Moreover, a company official testified that the "best reason and the only reason" for not allowing Leaf employees to initiate transfers to Branch with retention of seniority was the adverse effect on the seniority of Branch employees. But it is now settled that the mandate of Title VII should not be abated because enforcement of the law will frustrate the expectations of employees who have greater departmental but less company seniority than an employee who has been subjected to discrimination. Robinson v. Lorillard Corp., 444 F.2d 791, 800 (4th Cir. 1971).

There is another reason why the exemption granted in § 2000e-2(h) is not available to the company. That section contains a proviso that restricts its application to situations where differences in the conditions of employment "are not the result of an intention to discriminate." The evidence discloses that for a number of years the company overtly assigned white workers to the fabrication department and black workers to lower paying jobs in prefabrication and Leaf. Though this practice has been discontinued, its discriminatory effect survived the enactment of Title VII because the company prohibited black Leaf employees from seeking transfers to fabrication without forfeiting their seniority. Intentional segregation of the past that is perpetuated by a company's seniority system precludes the company from claiming that its system is bona fide within the meaning of § 2000e-2(h). United States v. Bethlehem Steel Corp., 446 F.2d 652 (2d Cir. 1971); Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971); Griggs v. Duke Power Co., 420 F.2d 1225, 1236 (4th Cir. 1970), *rev'd on other grounds*, 401 U.S. 424 (1971); Local 189, United Papermakers and Paperworkers v. United States, 416 F.2d 980, 987 (5th Cir. 1969). Supported by the reasoning of

these cases, we hold that when present differences in working conditions are remnants of past intentional discrimination, the proviso of § 2000e-2(h) bars a company from defending its employment practices on the ground that its employees "work in different locations."

The company and the union assert that in any event black seasonal employees at Leaf should be denied relief. These employees, however, perform substantially the same work and are paid at the same rate as many of the regular employees. Some of them work seasonally by choice because they are farmers; others would prefer regular work with the company but have found only seasonal employment available. Many have worked for a sufficient number of seasons to acquire significant company seniority. The record does not support the inference, nor did the district court find, that as a group they are inferior to regular workers. The fact that seasonal employees are represented by a different union presents no obstacle to their transferring to the fabrication department. United States v. Chesapeake & Ohio Ry. Co., 471 F.2d 582, 591 (4th Cir. 1972).

Although the seniority rosters of Leaf and Branch need not be merged, we conclude that regular and seasonal black employees at Leaf who were hired before the company eliminated discrimination at fabrication should be permitted to transfer to that department as permanent vacancies occur in jobs they can perform. Further, they should receive the training for which they qualify. A transferee's new departmental seniority should be computed from his employment seniority date. The class of employees entitled to back pay should also be enlarged to include Leaf employees. We leave to the sound judgment of the district court the definition of the class of Leaf employees entitled to relief and the details of implementing our modification of its decree.

Opinion, September 24, 1975, Fourth Circuit Court of Appeals.

Regular and seasonal Leaf employees also seek entry into the prefabrication department, and many seasonal employees seek regular employment in Leaf on the basis of their company seniority. The district court, finding no racial discrimination in hiring at prefabrication and Leaf, denied their requests. We affirm because the Act does not oblige a company to allow black employees to transfer into departments that were always open to black applicants without discrimination. United States v. Chesapeake & Ohio Ry. Co., 471 F.2d 582, 588, 593 (4th Cir. 1972); United States v. Bethlehem Steel Corp., 446 F.2d 652, 662 (2d Cir. 1971).

II

The appellants asked the district court to require the company to submit compliance reports for four years, furnishing information on all personnel action affecting members of the class to whom relief had been granted. The district court, however, did not fully grant this request. Instead, it directed the company to maintain records, open to inspection by plaintiffs' counsel, of all action taken pursuant to the decree. The court also required the company to file every six months for two years specific detailed information about appointments to supervisory positions and the tests selected by the company for use in filling craft positions. The court retained jurisdiction to enforce compliance with its order.

A district court must necessarily exercise broad discretion in determining what compliance reports are required. In United States v. W. T. Grant Co., 345 U.S. 629, 633 (1953), the Court established standards for determining whether an injunction should be granted when the defendant ceases its illegal practices after suit has been filed. These standards are the good faith of the company's intent to comply, the effectiveness of its reform, and the

character of its past violations. Although *Grant* differs factually, we believe that it may be adopted to furnish guidance whenever a district court must determine what compliance reports are appropriate.

Nothing in the record or in the briefs indicates the company intends to evade the court's decree. Before and after suit was filed, the company took steps to eliminate some of the discriminatory practices that existed in its plants. It has questioned the employees' interpretation of Title VII, but it has not defied the law. We conclude, therefore, that tested by the standards established in *Grant*, the district court did not abuse its discretion.

III

The union has raised numerous assignments of error. Because the district judge carefully considered each issue and fully stated the reasons for his rulings against the union, our discussion can be brief.

Contrary to the union's claim, the requirement of § 2000e-5(b) that a complaint be sworn is not a jurisdictional prerequisite to suit. The requirement "is directory and technical rather than mandatory and substantive." Choate v. Caterpillar Tractor Co., 402 F.2d 357, 359 (7th Cir. 1968); *accord*, Georgia Power Co. v. EEOC, 412 F.2d 462, 466 (5th Cir. 1969).

The union's defense that the suit was not timely is refuted by the facts. The Act formerly required a complainant to file suit within 30 days of receiving notice from the EEOC of his right to sue. The record discloses that notice to the plaintiff, Edgar Russell, was mailed in Washington, D.C., on December 5, 1967. Suit was filed on January 5, 1968. The union argues that since 31 days separate December 5 and January 5, and since the record does not show on what day Russell received notice, the suit may

have been untimely and should be dismissed. The district court, however, recognized that a person is not charged with receiving a notice in North Carolina on the same day that it is mailed from Washington. *See* Federal Rules of Civil Procedure 6(e). It properly ruled that the suit was timely.

Russell's charge named the union as a respondent, but the EEOC failed to give the union notice of the charge and did not attempt conciliation with it. The union maintains that the EEOC's omission deprived the court of jurisdiction. Similar contentions have frequently been rejected. A Title VII complainant is not charged with the commission's failure to perform its statutory duties. Dent v. St. Louis-San Francisco Ry. Co., 406 F.2d 399 (5th Cir. 1969); Johnson v. Seaboard Air Line R.R. Co., 405 F.2d 645 (4th Cir. 1968).

While Russell's charge was not phrased with the specificity of a legal pleading, it adequately explained to the EEOC that both the company and the union discriminated against black employees in job assignments and promotions. Measured by the standards of Graniteville Co. v. EEOC, 438 F.2d 32, 37 (4th Cir. 1971), it provided a sufficient foundation for instituting this class action.

The union also challenges Russell's representation of Leaf employees because he works in Branch and his interests might conflict with those of a Leaf employee who has greater seniority. Title VII litigation, though nominally private, has "heavy overtones of public interest." Therefore, an individual employee may represent others who are also subject to racial discrimination, even though they work in different departments and the particulars of the discrimination are not identical. Jenkins v. United Gas Corp., 400 F.2d 28, 33 (5th Cir. 1968). Moreover, Russell's effectiveness belies any notion that Leaf employees were

denied the fair and adequate representation of their interests which Federal Rules of Civil Procedure 23(a)(4) seeks to assure.

The only other assignment of error warranting discussion is the union's contention that it was erroneously assessed back pay along with the company. The evidence disclosed that many of the discriminatory practices about which the black employees complained were embedded in the bargaining agreement negotiated by the union. Further, it spurned the company's efforts to ameliorate some of the discriminatory terms of the agreements. The union contends, however, that because the black employees did not protest racial discrimination as a grievance and because they attended a meeting at which the current bargaining agreement was unanimously ratified, the district court erred by ordering it to contribute to the award of back pay.

Section 2000e-2 of the Act obliges unions, no less than employers, to refrain from unfair employment practices, and § 2000e-5(g) expressly authorizes back pay awards against labor organizations that violate the law. In neither section did Congress absolve a union whose disadvantaged members acquiesced in the unfair conditions of employment, and there are sound reasons why courts should not engraft this exemption on the Act. Unions have long been required to negotiate for all their members without discrimination because of race, and they cannot bargain away the right to fair employment assured by Title VII. Steele v. Louisville & Nashville R.R. Co., 323 U.S. 192 (1944); Robinson v. Lorillard Corp., 444 F.2d 791, 792 (4th Cir. 1971). Moreover, because of "the realities of entrenched employment discrimination," a worker need not complain, other than to the EEOC, as a prerequisite to judicial relief. Bing v. Roadway Express, Inc., 485 F.2d 441, 451 (5th Cir.

1973); *accord,* Hairston v. McLean Trucking Co., —— F.2d ——, —— (4th Cir. 1975); *but cf.* Thornton v. East Texas Motor Freight, 497 F.2d 416, 420 (6th Cir. 1974). We conclude, therefore, that transferring the burden of discrimination from the union, which is charged with eliminating it, to acquiescent members, who suffer from it, would subvert the remedial purpose of the Act.

Local 192 also argues that it would be inequitable to assess it for back pay because it is a non-profit organization with meager assets. It suggests that the company can better afford to pay the award. This argument rests on the faulty premise that back pay awards are only compensatory. Though punitive damages are not allowed, the award serves a dual purpose. In addition to compensating employees who have been wronged, the "reasonably certain prospect" of a back pay award is designed to induce unions, as well as employers, to voluntarily eliminate unfair labor practices. Albemarle Paper Co. v. Moody, 43 U.S.L.W. 4880, 4884 (U.S., June 25, 1975); Hairston v. McLean Trucking Co., —— F.2d ——, —— (4th Cir. 1975). Accordingly, we affirm the district court's award of back pay against the union.

The judgment of the district court is affirmed in part and modified in part, and the case is remanded for further proceedings consistent with this opinion. The appellants shall recover from the company and the union their costs of appeal, including a reasonable attorney's fee in an amount to be determined by the district court.

Order, November 4, 1975, Denying Petition for Rehearing, Fourth Circuit Court of Appeals.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 74-1650

EDGAR RUSSELL, et al.,

Appellees,

vs.

THE AMERICAN TOBACCO COMPANY, LOCAL 192, TOBACCO WORKERS' INTERNATIONAL UNION, and AFFILIATE AFL-CIO,

Appellees,

UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Amicus Curiae.

No. 74-1652

EDGAR RUSSELL, et al.,

Appellees,

vs.

THE AMERICAN TOBACCO COMPANY, et al.,

Appellants.

ORDER

Upon consideration of the petitions for rehearing filed by The American Tobacco Company suggesting rehearing in banc and by Local 192, Tobacco Workers' International Union;

BLEED THROUGH

Order, November 4, 1975, Denying Petition for Rehearing, Fourth Circuit Court of Appeals.

With the concurrence of Judge Winter and Judge Field, and in the absence of a request for a poll of the entire court as provided by appellant number 35(b),

It is ADJUDGED AND ORDERED:

1. The sentence on page 6 of the slip opinion states:

> "The merger did not include seasonal employees, who continued to be represented by a separate union."

is deleted.

2. The following sentence is substituted:

> "Seasonal employees, however, continued to work under a separate bargaining agreement."

3. The last sentence on page 11 continuing to the top of page 12, which states:

> "The fact that seasonal employees are represented by a different union presents no obstacle to their transferring to the fabrication department. United States v. Chesapeake & Ohio Ry. Co., 471 F. 2d 582, 591 (4th Cir. 1972)."

is deleted.

4. On Page 17, citation is corrected to read as follows:

> *Robinson* v. *Lorillard Corp.*, 444 F.2d 791, 799 (4th Cir. 1971).

5. In all other respects, the petitions for rehearing are denied.

.....
United States Circuit Judge
John D. Butzner, Jr.